



Supervisor Newsletter

Substance Abusing Behavior

Employees who are abusing alcohol, prescription drugs, and/or street drugs may suffer from side effects, resulting in severe mood swings and emotional outbursts. This kind of behavior is upsetting to coworkers and can cause disruptions in the workplace. Handling these types of situations is one of the most difficult problems supervisors can face. Unfortunately—in today's world—dealing with problem employees, including substance abusers, is a fact of business life.

When employees' substance abuse makes it hard for them to get their own work done—and especially when their behavior interferes with other workers' safety or productivity—supervisors have to intervene.

When the only supervisor in a company is the business owner, it can be particularly difficult. Small business owners must constantly juggle competing concerns when trying to run their business while dealing with a problem employee. But if an employee is causing problems in the workplace, other workers could potentially file charges of a hostile work environment, or they might quit. If the problem employee angers—or even worse, injures—a coworker, customer, or client, the business owner or manager will have to deal with the fallout.

Employers have an absolute obligation to provide a workplace that is safe for other employees, customers, and clients, and to provide a workplace that is not a hostile working environment. But even if there are no injuries or ill will caused by a substance abuser, when an employee is not producing as expected, company profits suffer.

Willful Misconduct

Employers have a right to require performance at an acceptable level, and workers can of course be fired for not doing their job. But if a company terminates an employee, the employer will always be in a much more secure legal position if the company can prove that the terminated worker engaged in willful misconduct and was in fact fired for a legitimate reason. Remember that mere negligence and carelessness is not enough to prove "misconduct" under its legal definition.

If a supervisor can show that a terminated employee was insubordinate, violated a work rule, was excessively absent, disobeyed a reasonable order, or engaged in any number of behaviors which indicate that the employee was willfully disregarding the employer's interest, most terminations under these circumstances would be upheld. However, if a positive drug test is added to the reasons for termination, then the employer's position is even stronger. Obviously, drug use is a violation of the company substance abuse policy and constitutes willful misconduct. This is one of the reasons that reasonable suspicion drug testing is so important.

But what about a case in which the employee has been a good worker and has received excellent performance reviews in the past, and has only recently become a "problem employee" due to substance abuse or other issues?

As long as the supervisor can show that work performance deteriorated (regardless of how quickly the deterioration occurred)—as evidenced by well-documented verbal and written

warnings—the company should be protected in its actions. Court rulings across the country have found that unsatisfactory work performance alone can constitute willful misconduct, but in the case of a substance abusing employee, a positive reasonable suspicion drug test result can provide even stronger legal protection for the company. However, for a drug test to be justified, reasonable suspicion checklists and procedures should be designed in such a way to show that the employee engaged in unacceptable work performance and/or had not been working to the best of his or her ability, was indifferent to whether or not he or she performed his/her job well, and showed intentional disregard to the company's interests, or an intentional disregard to his/her obligations and duties under company policies.

It is important to record any and all instances of misconduct so that the company can provide documentation that the reasonable suspicion drug test was conducted because the employee was consistently engaging in unacceptable work performance.

Documenting Employee Misconduct

Documenting unacceptable work performance is an important part of a supervisor's job, and should be a part of basic "Management Training 101."

Supervisors should make it a habit to document all instances of employee misconduct. Even if work performance improves, a record of the unacceptable behavior should be maintained in the employee's file in case there is a recurrence of the problem(s). Along with the reasonable suspicion checklist, employee misconduct should be documented through performance reviews, job evaluations, incident reports, memorandums, and any emails to the employee regarding the problem behavior(s). Supervisors should document dates, times, names of witnesses and their job titles, the actual misconduct committed, and the policies that were violated. Preferably, any reasonable suspicion documentation would include counseling the employee on the violation(s) that led up to the drug test before the test was performed.

In addition to providing legal protection for the company against wrongful termination lawsuits, having documentation of employee misconduct is beneficial if the employer wishes to protest the awarding of unemployment benefits. Complete and comprehensive documentation makes it possible for the company to provide a factual basis that the employee's misconduct was willful and deliberate and that benefits should be denied. Supervisors should be motivated to protest these claims, because each claim that is charged to the company's unemployment insurance account number causes rates to increase.